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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GARY OSBOURNE DAWSON,<br><br>Defendant and Appellant. | B229991<br><br>(Los Angeles County<br>Super. Ct. No. LA065402) |

APPEAL from judgment of the Superior Court of Los Angeles County. Elizabeth A. Lippitt, Judge. Affirmed in part, reversed in part and remanded.

Lynne S. Coffin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Marc A. Kohm and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Gary Dawson of six counts of robbery (Pen. Code, § 211),[1] one count of assault with a semiautomatic firearm (§ 245, subd. (b)), and three counts of assault with a firearm (§ 245, subd. (a)(2)). The crimes were committed during three separate incidents, on three separate days, each incident involving two victims. In a bifurcated part of trial, the jury found that Dawson had suffered a prior conviction for residential burglary; the prior conviction qualified as a strike and a prior serious felony (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d); 667, subd. (a)(1)). Also, the trial court found Dawson committed a felony while released on bail in another case (§ 12022.1). Dawson was sentenced to state prison for an aggregate term of 38 years. We find one of Dawson's convictions for assault with a firearm must be reversed; we otherwise affirm the remaining convictions. We remand for resentencing.

## FACTS

### Counts 1, 2 and 3

On July 28, 2009, Dylan Roby and Royce Park drove to an apartment building on Woodley Avenue in the San Fernando Valley to check out a BMW that was advertised for sale on "craigslist." When they arrived at the address, Dawson greeted them at the curb, and told them to follow him to an alley behind the apartment building. Once in the alley, two other men approached. One of the men, later identified as Jaime Valencia, had a baseball bat. The second man, later identified as Bradley Chapman, wielded a "semi-automatic type gun." Chapman pulled the slide on the gun back to show Roby a bullet in the chamber, then pointed the gun at Park. Chapman hit Park in the face with the hand that held his gun. The robbers took Roby's car keys, and Park's wallet, keys, watch and iPhone. The robbers then went to Roby's car, and took his iPod, Bluetooth headset, and $4,000 that Roby had brought with him to buy the advertised BMW.

[1] All further section references are to the Penal Code.

**Counts 4, 5 and 6**

On July 31, 2009, Satoshi Mochizuki and Michitaka Toba drove to an apartment building on DeSoto Avenue in the San Fernando to check out a car that was advertised for sale on craigslist. When they arrived at the address, they did not see anyone there. Shortly thereafter, the "seller" called Mochizuki's cell phone, and told him to wait in alley behind the apartment building. After Mochizuki and Toba walked to the alley, two men approached. They were later identified as Chapman and Julio Moratoya. Chapman was armed with a revolver. The robbers took Mochizuki's cell phone, and Toba's cell phone and wallet, which contained $9,500 that Mochizuki had given Toba to hold. There was a struggle. Mochizuki grabbed Chapman, then fell to the ground. Chapman struck Mochizuki in the head with the gun, causing Mochizuki to bleed "a lot." The robbers ran away.

**Counts 7, 8, 11, and 12**

On August 3, 2009, Phillippine Nguyen and his brother, Jimmy Phan, drove to an apartment building on DeSoto Avenue in the San Fernando Valley to check out a car that had been advertised for sale on craigslist. When they arrived at the address, the "seller" called Nguyen and told him to go to an alley behind the building to see the car. After Nguyen and Phan went into the alley, two armed men approached. They were later identified as Chapman and Valencia. Chapman pointed a revolver at Nguyen, and told him to get on the ground. Valencia had a semi-automatic handgun. The robbers took Nguyen's wallet, keys and $4,500. Valencia pointed the gun at Phan. The robbers took Phan's wallet. Chapman and Valencia ran away. Nguyen and Phan went to their car and followed Valencia and Chapman, who entered a car. Valencia and Chapman made a u-turn. Chapman exited the car and pointed the gun at Nguyen and Phan. Nguyen stopped following them.

**The Investigation**

Los Angeles Police Department (LAPD) Detective Pam Pitcher investigated the series of robberies. On August 4, 2009, police arrested a suspect based on the telephone number used by the craigslist "seller" in connection with the crimes. On August 5, 2009, Dawson called Detective Pitcher, and stated that he had placed the advertisements on craigslist. During a subsequent recorded interview, Dawson said that he knew both Chapman and Moratoya. Dawson further stated he had placed an ad on craigslist for Chapman and another for Moratoya as a favor. Dawson denied knowing that Chapman and Moratoya were going to commit robberies. Dawson was arrested.

LAPD Officer Kyle Douglas transported Dawson to jail. At the jail, Officer Davis overheard Dawson and a female talking about why they were in custody. The female said that she was being booked for shoplifting. Dawson said, "What's the point of coming to jail for shoplifting? You probably only got two dollars. I am probably going to do about 10 years, but at least it's for something worth it. If you're going to do something to get in jail, at least get $20,000, not two."

**The Criminal Proceedings**

Dawson, Chapman, Moratoya and Valencia were initially held to answer on the charges related to the three robbery and assault incidents described above. Chapman, Moratoya and Valencia eventually pleaded guilty, and the criminal case went forward against Dawson. The People filed an amended information charging Dawson with six counts of robbery (§ 211; counts 1, 3, 4, 6, 7 and 8, as to victims Roby, Park, Mochizuku, Toba, Nguyen and Phan, respectively); assault with a semiautomatic firearm on Park (§ 245, subd. (b); count 2); and three counts of assault with a firearm (§ 245, subd. (a)(2); counts 5, 11 and 12, as to victims Mochizuki, Nguyen and Phan, respectively). Further, the information alleged that Dawson suffered a 2008 conviction for residential burglary which qualified as a prior strike and as a prior serious felony. (§§ 667, subds. (a)(1) & (b)–(i), 1170.12, subds. (a)-(d).) As to all counts, the information alleged that a principal was armed with a handgun. (§ 12022, subd. (a)(1).) The information alleged Dawson

was released on bail in a Riverside case at the time he committed the second degree robbery of Phillippine Nguyen as alleged in count 7. (§ 12022.1.)

The charges were tried to a jury. The trial was prosecuted for the most part on a theory of aiding and abetting liability, and the prosecution evidence at trial established Dawson's involvement in each of the three robbery and assault incidents as summarized above. Dawson testified on his own behalf. He admitted he posted classified advertisements on craigslist, but said he did so only as a favor to Chapman and Moratoya because they did not have their own computers. Dawson denied knowing that Chapman and Moratoya planned to commit robberies. Dawson admitted being present at the incident on July 28, 2009, but said he was only there to help arrange paperwork so Moratoya could sell his car. Dawson testified he saw Chapman and another man commit the robbery, but he denied any further involvement. Dawson denied any involvement in posting the craigslist advertisement related to the incident on July 31, 2009. He admitted he posted the craigslist advertisement related to the incident on August 3, 2009, but said he knew nothing about the robbery.

The jury returned verdicts finding Dawson guilty of all counts, but found all of the principal armed allegations to be not true. Following a bifurcated part of trial, the jury returned a verdict finding true the allegations that Dawson suffered a prior serious felony conviction in 2008 for residential burglary. Dawson waived jury trial on the bail allegation, and the court found the allegation to be true.

On November 17, 2010, the trial court sentenced Dawson to an aggregate term of 38 years in state prison as follows: on count 2 (assault with a semiautomatic firearm): nine years, the upper term, doubled to 18 years for the prior strike. As to each and all of the remaining nine counts: a term of one year (one-third the mid-term of three years), doubled to two years for a prior strike. The court further imposed a two year term for the out-on-bail allegation. The court ordered Dawson to pay various restitution fines and penalties and assessments, none of which are at issue on appeal.

## DISCUSSION

### I. The Instructional Issue

Dawson argues his conviction for assault with a semiautomatic firearm as alleged in count 2 and his convictions for assault with a firearm as alleged in counts 5, 11 and 12 must be reversed because the trial court did not instruct sua sponte on the lesser included offense of simple assault. We disagree as to the assault with a semiautomatic firearm as alleged in count 2, and the assaults with a firearm as alleged in counts 11 and 12; we agree as to the assault with a firearm as alleged in count 5.

A trial court is required to instruct sua sponte on all lesser included offenses when the evidence warrants such instruction. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149 (*Breverman*).) Instruction on a lesser included offense is required when a reasonable jury could find that the defendant committed the lesser offense. (*Id.* at p. 162.) On the other hand, there is no duty to instruct on a lesser included offense when there is no substantial evidence to support it. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.)

At trial, Dawson raised the issue whether the firearms wielded in the three crime incidents were "real" and loaded firearms, or look-alike, "fake" firearms. The victims, none of whom were firearms specialists granted the opportunity to fully examine the weapon, could not say *definitively* that the guns were in fact real. As Dawson's counsel argued in connection with "the counts that involve firearms," the prosecution "didn't bring in any evidence that it was an actual [firearm] or testimony to prove to you beyond a reasonable doubt that it was [a firearm]."

As to the assault charges alleged in counts 2, 5, 11 and 12, the trial court properly instructed the jury that the People were required to prove Dawson "did an act with a firearm that by its nature would directly and probably result in the application of force to a person." On appeal, Dawson argues there was "scant" evidence that the "firearms" used in the three sets of crimes were real firearms. Further, he argues that, because the jury could have found that the "firearms" used in any of the three crime incidents were "fake firearms," i.e., not firearms at all, then instruction on the lesser included offense of

simple assault were required. Further, Dawson contends the failure to give instructions on the lesser offense of simple assault requires that all of his assault convictions be reversed.

**A. Assault**

A threat of injury from pointing an unloaded firearm, or a fake firearm, *does not constitute an assault* because the assailant does not, in fact, have the present ability to inflict injury by the act of shooting. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 (*Rodriguez*); and see also *People v. Vaiza* (1966) 244 Cal.App.2d 121, 124-125; *People v. Sylva* (1904) 143 Cal. 62, 64.) Under the instructions given at trial, if the jury found Dawson did an act with an instrument that was not a firearm, i.e., a fake firearm, then he was not guilty of the charged crime of assault with a firearm.

**B. Counts 11 and 12**

Dawson was convicted in counts 11 and 12 of assaults with a firearm on victims Philippine Nguyen and Jimmy Phan during the incident on August 3, 2009. The trial evidence as to these counts showed that, after Nguyen and Phan were robbed at gunpoint by Chapman and a cohort, they followed the robbers. The robbers made a turn, and Chapman exited the car and pointed the gun at Nguyen and Phan.

Instruction on simple assault was not required as to counts 11 and 12 because Dawson was either guilty as an aider and abettor of assault with a firearm by Chapman's use of a real firearm, or he was not guilty of an assault crime at all because the instrument that Chapman used could not, in fact, have inflicted any injury. (*Rodriguez, supra,* 20 Cal.4th at p. 11, fn. 3; *People v. Vaiza, supra,* 244 Cal.App.2d at pp. 124-125; *People v. Sylva, supra,* 143 Cal. at p. 64.) In short, Chapman either pointed a real firearm at the victims, or a non-shootable instrument that was not a firearm. If the latter was the situation, there was no assault. If the jurors believed no firearm had been used, then they would have acquitted Dawson. Because there was no evidence to support an instruction on the lesser offense of simple assault as to counts 11 and 12, there was no instructional error.

**C. Count 5**

Dawson was convicted in count 5 of assault with a firearm on victim Satoshi Mochizuki during the incident on July 31, 2009. The trial evidence as to count 5 showed the following: Chapman and a cohort were the direct perpetrators, and Chapman used what was testified to be a "revolver." The robbers took Mochizuki's cell phone, and took from victim Michitaka Toba a cell phone and wallet. The wallet contained $9,500 that Mochizuki had given Toba to hold. There was a struggle, and Chapman hit Mochizuki in the head with the gun, causing Mochizuki to bleed "a lot."

Count 5 was submitted to the jury as a charge of assault with a firearm based upon evidence showing that Dawson's cohort in crime, Chapman, pointed a revolver at victim Mochizuki, and hit Mochizuki in the head with the revolver. We agree with Dawson that, if the jurors did not believe the revolver was a "real" firearm, then they reasonably could have found a simple assault had been committed. In this factual scenario, the assault could have been based upon the act of threatening Mochizuki with the gun or by hitting him with the gun. If the jury believed the assault was committed by hitting him with a fake gun, then the assault would not have been committed with a firearm.[2] Accordingly, instruction on the lesser included offense of simple assault was required. (*Breverman, supra,* 19 Cal.4th at pp. 148-149.)

This leaves us to address the effect of the instructional error. In a non-capital case, the failure to instruct on a lesser included offense is reviewed for prejudice under the test articulated in *People v. Watson* (1956) 46 Cal.2d 818, at page 836. (*Breverman, supra,* 19 Cal.4th at p. 178.) Here, we find a reasonable probability that the result of his trial would have been affected as to count 5 had the trial court instructed on the lesser offense of simple assault. As to the crime incident involving count 5, the jury could have believed that the item Chapman was carrying was not an actual, working firearm that he used it to hit the victim. In examining whether substantial evidence supports a jury's

[2] By similar reasoning, the jury also could have found that an assault with a deadly weapon (not a firearm) had been committed by an instrument used as a club or bludgeon, or an assault by means of force likely to produce great bodily injury.

finding that a real firearm was used in a crime, the law does not require that the firearm be recovered and tested to establish its true nature. (*People v. Hayden* (1973) 30 Cal.App.3d 446, 452 [circumstantial evidence in the form of testimony describing the weapon and its role in the crime constitutes substantial evidence that an item which appeared to be a firearm was, in fact, a firearm], disapproved on other grounds in *People v. Rist* (1976) 16 Cal.3d 211, fn. 10.) But the issue here is not whether there was substantial evidence in support of the verdict. Instead, the issue is whether there was evidence from which a reasonable juror could conclude that the lesser offense of simple assault, and not only assault with a firearm, was committed. Against the evidence supporting the jury's finding that a real firearm was used, there was some evidence to support a different finding.

In support of the contention that he was prejudiced by the failure to instruct on simple assault, Dawson relies on a jury question during deliberations, coupled with the jury's "not true" findings on the principal armed allegations. Specifically, during deliberations, the jury sent the following note to the court:

> "[#1] On the assault charges, can we find the defendant guilty of assault without a firearm or semiautomatic weapon? [#2] For example, can we find him guilty . . . and answer not true to [the principal armed allegation]."

The court returned the following response to the jury:

> "#1 No.
>
> #2 If you find the defendant guilty of assault with a firearm or semiautomatic firearm, then you can answer true or not true regarding the allegation."

We cannot delve into the minds of the jurors to attempt to discern what they were thinking when they posed their question to the trial court. Nevertheless, we do not believe the failure to instruct on simple assault was harmless. While the guilty verdict as to count 5 shows the jury necessarily found that a real firearm had been used, we are not

satisfied that the result would have been the same as to count 5 had an instruction on the lesser offense of simple assault been given. Dawson's conviction for assault with a firearm as alleged in count 5 must be reversed.

**D. Count 2**

Dawson was convicted in count 2 of assault with a semiautomatic firearm on victim Royce Park during the incident on July 28, 2009. The evidence at trial established that Dawson's cohort, Chapman, was carrying a weapon that looked like a semiautomatic firearm. Chapman approached Park and the other victim, Roby. Chapman pulled back the "slide" on the gun to show Roby a bullet in the chamber, then pointed the gun at Park. Chapman hit Park in the face with the hand that held his gun.

As to this count, we believe instruction on simple assault should have been given, but we do not believe the error was prejudicial. (*Breverman, supra,* 19 Cal.4th at p. 178; see also, *People v. Watson* (1956) 46 Cal.2d 818, 836.) Though Roby was not a firearms expert and admitted he did not know how to identify a bullet sitting in a chamber, the act of pulling back a slide strongly indicates it was a firearm. Dawson gave equivocal testimony about the nature of the weapon at trial, but he initially told police Chapman told him the gun was real. Also, Dawson said he saw the gun and thought it looked like a semiautomatic weapon. The real nature of the semiautomatic firearm in the assault on victim Park is supported by the trial testimony showing that Chapman pulled back the "slide" on the weapon to show that it was loaded with a bullet. We understand that if Chapman hit victim Park with a fake firearm, then the jury could have found a lesser (or different) assault crime had been perpetrated. We just don't agree based on the evidence involving this count, the error caused prejudice. (*Breverman, supra,* 19 Cal.4th at pp. 148-149.) As to count 2, we find no reasonable probability that the result of Dawson's trial would have been different.

**II. Section 654**

Dawson contends the trial court erred in imposing consecutive terms on the assault counts and the robbery counts. Dawson contends that section 654 prohibits consecutive terms because the assaults were committed to further the robberies. We disagree.

Section 654 prohibits the imposition of multiple punishments where a single act violates more than one criminal statute, or the defendant's acts comprise an indivisible course of conduct with a single intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19-20, clarified on another ground in *People v. Correa* (2012) __ Cal.4th __ ; 142 Cal.Rptr.3d 546.) The corollary is that the imposition of multiple punishments is proper where a defendant had multiple criminal objectives that were independent and not merely incidental to each other. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Whether a defendant had multiple criminal objectives is a factual question for the sentencing court, and its determination will be upheld on appeal when supported by substantial evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

We find substantial evidence supports the trial court's conclusion that the assault with a semiautomatic firearm on victim Park in count 2 was not merely incidental to the robberies of victims Roby and Park in counts 1 and 3. And we find substantial evidence supports the trial court's conclusion that the assaults with a firearm as to victims Nguyen and Phan in counts 11 and 12 were not merely incidental to the robberies of victims Ngueyn and Phan in counts 7 and 8. (As discussed above, the assault in count 5 must be reversed.) Substantial evidence supports the conclusion that the assaults were gratuitous, and unnecessary to accomplish the robberies. The robberies were accomplished by fear; there was no need to assault the victims. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1264-1265.) In the assault of Park (count 2), there was no evidence he was resisting the robbery. The assault was unnecessary. In the assaults of Nguyen and Phan (counts 11 and 12), it is not subject to question that punishment for two acts is appropriate. After the victims were robbed at gunpoint, they followed their assailants. It was after the robbery, when the other defendants were being followed, that they then again pointed a gun at the victims to stop their pursuit. Where an assault occurs after the robbery, a defendant can properly be punished for both acts. (*People v. Johnson* (1969) 270 Cal.App.2d 204, 208-209; *People v. Watts, supra,* 76 Cal.App.4th at p. 1265.)

In summary, we find substantial evidence supports the trial court's findings that the assaults were not the means to accomplish the robberies, and that the assailant had distinct objectives in committing the robberies and the assaults.

**DISPOSITION**

Dawson's conviction for assault with a firearm as alleged in count 5 is reversed. All of his remaining convictions are affirmed. The cause is remanded to the trial court for retrial as to count 5 at the People's election, or other further proceedings as needed, and for resentencing.

BIGELOW, P. J.

We concur:

RUBIN, J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.